

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Construc-
tion of a Marina on the St. Croix River in
the City of Bayport, Washington County.

REPORT OF THE
HEARING EXAMINER

The above-entitled matter came on for hearing before Allan W. Klein,
Hear-

ing Examiner, on January 16, 1979, in the Washington County
Courthouse at

Stillwater, Minnesota. Additional hearings were held on June 4, 5,
6, 7, 28,

29, and 30. The hearing then went into an extended recess to
allow for the

preparation of certain documents, and did not resume until January
18, 1982.

The hearing concluded on January 19, 1982. The record closed on
April 26,

1982.

A. William Clapp III, Special Assisi--ant Attorney General, Box
38, Centen-

nial office Building, St. Paul, Minnesota 55155, appeared on
behalf of the

Minnesota Department of Natural Resources. Roderick A. Lawson,
Attorney at

Law, Lawson, Raleigh & Marshall, 3825 Lake Elmo Avenue North, Lake
Elmo, Minne-

sota 55042, appeared on behalf Al Holmen, David Parkhill, Fred
Sauer, Donald

Perrenoud, and Moelter Construction Company, Inc., the Applicants
herein. Ray-

mond M. Roedet, Assistant Attorney General, Wisconsin Department
of Justice,

P. O. Box 785, Madison, Wisconsin 53707, appeared on behalf of the
Wisconsin

Department of Natural Resources, Intervenor herein.

This Report is a recommendation, not a final decision. The Commissioner of

Natural Resources will make the final decision after a review of the record; he

may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations-

tions contained herein. Pursuant to Minn. Stat. sec. 15.0421 (1980), the final

decision of the Commissioner shall not be made until this Report has been made

available to the parties to the proceeding for at least ten days. An opportunity-

must be afforded to each party adversely affected by this Report to file

exceptions and present argument to the Commissioner. Parties should contact A.

William Clapp III, Special Assistant Attorney General, to ascertain the procedure-

for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue to be determined in this contested case proceeding is whether or

not the Applicant should be granted a permit to complete the construction and

commence operations of either one of two alternative proposals on a site located-

ed on the St. Croix River in the city of Bayport, Minnesota. The alternative

proposals are: (1) A 237-slip marina with storage capacity for an additional

200 boats; or (2) a 244-slip marina and a 41-unit condominium development.

Based on all of the proceedings herein, the Hearing Examiner makes the

following:

FINDINGS OF FACT

1. The site at issue has been used for commercial purposes intermittently

since the 1920's when it was used for a large enclosed rollerskating rink. in

the early 1960's, the site was owned by one H. A. Goglin, who planned to develop a marina on it. He did operate a nightclub there and developed plans for dredging and filling to create a marina. The dredging and filling was not done by him, but his plans formed the basis of subsequent dredging and filling.

2. in 1964, Moelter Construction Company acquired the land from Goglin. Moelter immediately applied to the U. S. Army Corps of Engineers and the Minnesota Conservation Department for permits to dredge and fill for the purposes of creating a marina. On December 17, 1964, the Corps granted the requested permit, and in 1971, extended the permit to December 31, 1971. (Ai December 17, 1964, the Minnesota Conservation Department granted the requested permit, and on January 22, 1971, extended it to November 30, 1971.

The applications and permits were for dredging and filling. They did not detail the configuration or operation of a marina although that was obviously the intended use.

3. At various times between 1964 and 1971, Moelter did dredge and fill pursuant to the permits. Moelter was in the excavation business, and would work on the marina when its dragline was not otherwise used in the business.

4. Almost immediately after purchasing the property from Goglin, Moelter placed the land for sale. It was listed with at least three Realtors and was offered by the owner during times that it was not subject to a listing agreement. Between 1964 and 1976, a number of transactions for the sale of the property were commenced, but none were completed. All of the transactions prior to 1972 contemplated Moelter's completing the dredging and filling to make the land usable as a marina.

5. In 1976, a group of four individuals (Carl "Al" Holmen, David Parkhill, Fred Sauer, and Donald Perrenoud), operating informally as the "Bayport Marina Company," entered into an earnest money agreement to purchase the land, subject to their being able to obtain the necessary permits for a marina.

6. on November 14, 1977, the four individual Applicants submitted an application to the Minnesota Department of Natural Resources (hereinafter the "Department") for permission to construct a marina on the site. An identical application was submitted on January 15, 1979 on behalf of Moelter Construction

Company. This second application was submitted solely to avoid any technical-ities regarding the ownership of the site. It is these two applications which are at issue in this proceeding.

7. In summary , virtually all of the dredging and filling work necessary to make this site usable as a marina was completed by December 31, 1971. The site has been dormant -- unused and unoccupied -- since that date. Moelter Construction Company has attempted to sell the land since 1964, and the four individual Applicants have agreed to purchase the land subject to their being able to obtain the necessary permits to complete and operate a marina on the site.

8. The site is located on the banks of the St. Croix River. It is in the southern part of the City of Bayport, Washington County. A small portion of the site is located outside the city limits in the township of Bayport. The Bayport City Council has approved building permits for the project subject to required permits being obtained from other governmental entities.

9. The configuration of the site can best be understood by looking at aerial photographs (Applicants' Ex. B and fig. 2 of the final EIS, Applicant's

Ex. R) or drawings (figs. 4 and 5 of the final EIS, Applicant's Ex. R). Essentially, the dredging and filling done by Moelter created two long fingers of land which run parallel to the riverbank in a generally north-south direction. The shorter of the two is separated from the riverbank by water, and the longer of the two is separated from the shorter one by water as well. Thus, it could be said that there are two 'fingers' of water which have been created by the dredging and filling. The area of dredging and filling has generally been referred to as the "south part of the site". There is also a "north part of the site" which has not been dredged, but rather remains as a single piece of land.

10. When hearings on the application were held in 1979, Applicants were seeking a permit for the operation of a marina and associated facilities (including a storage building for 200 boats, a restaurant, boat sales operation, grocery store, etc.). Boat slips and the boat storage building would be located on the southern-part of the site, and the restaurant, boat store, grocery, etc. would be located on the north part of the site. During the lengthy period that these hearings were in recess, Applicants proposed an alternative plan. This alternative would include reducing the number of boat slips on the southern part of the site, eliminating the boat storage building, moving the restaurant, and adding a 41--unit condominium complex to the northern part of the site. Applicants have stated that they have no preference for either of the alternative plans, although in their final brief, they appear to prefer the marina-with-housing plan.

11. Under the "marina only" plan, a total of 237 boat slips would be placed along both sides of the two fingers of water existing at the site. The slips would house boats ranging in length up to 65 feet. The boat storage facility (often referred to in the record as the "high and dry building") would house 200 shorter boats ranging in length up to approximately 25 feet. This building would be between 25 and 35 feet high, 70 feet wide, and 400 feet long.

12. Under the 'marina and condominium' alternative, the number of boats

accommodated on the water would be slightly increased to 244, but the 200-space boat storage building would be eliminated. On the north part of the site, a building or buildings would be built to house the condominium units. They would be oriented so as to give each unit a river view, and would be no more than 35 feet high. Although the design and layout of the buildings housing the condominium units is still in the conceptual stage, figure 5 of the EIS shows two buildings, each forming one side of a "V". The apex of the 'V' faces directly east and one of the buildings runs northeast to southwest, while the other runs southeast to northwest.

13. There are a number of associated facilities which are common to both alternatives. In terms of structures, these common features include the following:

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1 Many of the precise details of the design and operation of either of the two alternate projects are unknown. It is the position of the Applicants that until they know, with certainty, that a permit will be granted (and the particular terms and conditions of any permit), it is not economically feasible for them to prepare detailed designs. This has proven to be a difficulty throughout the hearing process. However, it is the basic position of the Applicants that they will meet whatever restrictions are imposed upon them should a permit be granted.

A. South part of site:

1. Transient docks
2. Paved or graveled roadways extending the length of all three piers.
3. Comfort stations on all three piers
4. A service dock at the southern end of Pier No. 1 (the landward pier)
5. A boat well at the northernmost point of Pier NO. 1.

B. North part of the site:

1. A recreation area, including a swimming pool and three cabanas.
2. A restaurant-grocery-laundry building.
3. A new boat storage-sales-service building.
4. A parking lot for 150 cars.

14. There were a number of issues raised in connection with both alterna-

tive proposals, but all were overshadowed by the issue of the impact upon rec-

reational use of the St. Croix River. Crowding, and resultant displacement,

dissatisfaction and resource degradation were all a part of this central issue.

15. The St. Croix River is a major regional recreational resource. It is

used primarily by Minnesotans, secondarily by Wisconsinites, but also by people

from all over the country. It is perceived as having a number of attributes

which make it attractive for recreational use.

16. The entire river has been designated as a part of the National Wild

and Scenic Rivers program. This program, enacted as Public law 90-542 in 1968,

declares it to be federal policy that:

Certain selected rivers of the nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

(82 Stat. 906)

The site is located on the 'recreational' portion, which is commonly referred

to as the 'Lower St. Croix'.

17. The Lower St. Croix has been described as an "urban river". As such,

it is the only "urban river" designated for inclusion in the federal program.

The description 'urban' arises from the facts that: (1) the river is near and

easily accessible to the Twin Cities, (2) it has a number of communities along

its banks, and (3) it is very heavily used (in comparison with other rivers in

the program).

18. As well as being perceived as readily accessible from the standpoint

of transportation, the river is also perceived as being readily accessible from

the standpoint of public accesses. Non-boaters include hikers, swimmers, and

campers. While they can be found at many places along the river, their access

is particularly facilitated by the large state parks along the river's edge.

For boaters, access is available through ramps (which permit boats to

be brought to the river by trailer), marinas, boat rental facilities, and ri-

parian owners (either private or corporate/institutional) . Finally, boaters

may access the river from other waterways, principally the Mississippi River.

19. Recreational use of the river and its immediate environs consists of

a number of activities. These include boating, water-skiing, beaching, camp

ing, hiking, swimming, fishing, bird-watching, rock-climbing and various de-

grees of "socializing" ranging from sharing campfires to public keg parties.

20. A final aspect of recreational use of the river is the natural beauty which attracts many people as passive observers. There is at least one commercial operation which provides a tour, via excursion boat, for people who just want to look at the river.

21. Recreational use of the river by boaters who could logically be anticipated to house their boats at the proposed marina is, as a practical matter, limited to only a portion of the lower St. Croix. This practical limitation

arises from the existence of two sandbar areas which impede motor boat navigation: The Arcola sandbar, located just north of the Soo Line high bridge, and sandbars near the mouth of the Apple River. Between those sandbars and Taylors

Falls, boaters from the proposed marina cannot be logically expected to use the

river (except for occasional use during periods of high water).

Rather, their

use will be restricted to areas south of those sandbars, all the way down to

the end of the river at Prescott (and continuing on to the Mississippi in both

directions,. Therefore, only scant attention will be paid to the area north of

the sandbars, except to note that this de facto "zoning" has resulted in a

higher proportion of canoes, fishing boats, and small open boats in that area,

and a higher proportion of larger motor boats south of the sandbars.

In addition,

the natural attributes of the northern portion of the river are different

from those of the southern portion. The northern portion includes the Dalles

at Taylors Falls, and the river valley tends to be heavily wooded and steep-sided. Islands, sloughs, and backwater areas create a 'braded' effect.

22. The southern portion of the river can be characterized as wider and

lacking in the intimate island and slough environment. Islands are essentially

limited to an area north of Stillwater. From Stillwater all the way down to

Prescott, the river is relatively deep and wide, taking on the features of an

elongated reservoir-type lake. indeed, a portion of the river is known as

"Lake St. Croix" because it widens so dramatically. However, in spite of this

basic change in the river's character, there are occasional places where it is

so narrow that governmental bodies have found it necessary to restrict boat

speeds and curtail other activities.

23. Congestion on the lower St. Croix south of the Arcola sandbar must be viewed from a number of perspectives. First of all, there are two types of congestion which are viewed as problems by professional managers. The first is congestion on the water itself, and the second is congestion on beaching areas. But with regard to either of those two, congestion is a localized phenomenon; at the same time, on the same day, it is entirely possible that one point on the river would be congested, while another is not. Finally, congestion must be viewed as a temporal phenomenon - for the same point on the river, there are times when it is congested, and times when it is not.

These various viewpoints on the overall issue of congestion require that some policy decisions be made with regard to how the river is to be managed. Is it to be managed so as to minimize congestion at peak places and peak times, or is it to be managed on some "average" basis? Statutory and rule standards give little guidance to answer this question, but one of the three standards set forth in the underlying permitting statute (Minn. Stat. S 105.45) requires 'the Commissioner to consider whether an applicant's plans will 'adequately protect public safety'. At least to that extent, therefore, it is appropriate to examine the peak periods and locations as they affect

safety. Bit readers must be aware that these are periods.
 !lie iverway,
 is underused during weekdays and on some weekends.

24. With regard to use of tne water surface (as opposed to use of beaching areas), congestion is localized at a few points between the Arcola sandbar and Prescott. These points include the Hudson narrows (and associated islands) and Stillwater (and islands north of Stillwater). However, these can be said to be congested only at peak times. In ordinary times, they are not. The Hudson narrows area and associated islands are delineated in bands 12 and 13 as set forth on the attached map. It is reasonable to assume that the following changes would take place as a result of the construction of either of the two alternative projects for the Bayport marina:

TABLE 1: 1980 AVERAGE PEAK PERIOD BOATS IN MOTION AND CONTRIBUTION BY BAYPORT MARINA.

1980 Actual Alternative	437-boat Alternative	244-boat
Band 12 40.8 (10.8%)	7.9 (19.3%)	4.4
Band 13 27.0 (12.6%)	6.1 (22.6%)	3.4
Band 17 20.0 (12.5%)	4.5 (22.5%)	2.5
Band 18 17.6 (10.8%)	3.4 (19.3%)	1.9

25. Another way of looking at crowding in terms of boats in motion is to look at the number of acres per boat. The standards which were used during the hearing indicated safety deterioration for uncontrolled motorboating of 20 acres of water per craft, while for waterskiing, the standard was 30 acres per craft. Using the same data as used in Table I above, the following computations have been made:

TABLE 2: 1980 ACRES OF WATER SURFACE PER MOVING CRAFT AND CONTRIBUTION BY BAYPORT MARINA

1980 Actual Alternative	437-boat Alternative	244-boat
Band 12 12.8*	10.5*	11.3*
Band 13 18.8*	15.2*	16.5*

Band 14	30.7	24.1**	26.6**
Band 15	32.5	28.0**	29.8**
Band 16	26.2**	19.3*	21.8**
Band 17	16.3*	12.9*	14.1*

*Less than the 20-acre per craft recommended motorboating standard

**Less than the 30-acre per craft recommended waterskiing standard.

As can be seen, three of the bands already exceed the 20-acre? motorboating standard. Projections of the Bayport Marina indicate no additional motorboat-
ing 'violations' caused by the 244-boat alternative, but one additional viola-
tion caused by the 437-boat alternative. For waterskiing, a total of four
bands already exceed the recommended limit, and even the addition of the 244-
slip alternative would increase that number to all six bands, a situation which
would only be worsened under the 437-boat alternative.

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26. Overall boating use during peak periods would definitely increase under either alternative proposed by the Applicants. for example, looking at the segment of the river between Hudson and the Arcola sandbar, the 437-boat alternative would increase peak period boating use an average of 28.0%, while the 244-boat alternative would increase peak period boating use an average of 15.7%. of' course, if one uses the riverway as a whole, those percentages increase (to 8.5 and 4.7%), but such a measure is not realistic in light of the navigational restriction of the Arcola sandbar.

27. The other major area of consideration in discussing crowding is crowding at beaches. A number of studies based on aerial photography and on-site investigation have revealed that on peak days, slightly over half of the boats between the Arcola sandbar and Prescott will be beached. Studies over six years show that on average, 51.1% of the boats in this area are beached. The same average for the entire riverway is still 49.5%. The majority of boats which use the river do use a beach at some time in their trip. Therefore, beaching is an important consideration in use of the riverway.

There are, however, a limited number of beaching sites. The most popular beaching sites which can be projected to be used by boaters from the proposed marina are located in the same areas as the "narrows" discussed above in connection with moving boats: The Hudson narrows, and the Stillwater islands. thing the same type of analysis as was used above, the following impacts can be projected from the two alternative proposals for development of the Bayport marina:

TABLE 3: 1980 AVERAGE PEAK PERIOD BOATS BEACHED AND CONTRIBUTION OF

BAYPORT MARINA				
boat	1980 Actual	437-boat Alternative	244-	
Band 12	46.6	12.4	(26.6%)	
6.9 (14.8%)				
Band 13	68.6	23.5	(34.3%)	
13.2 (19.2%)				
Band 15	20.5	8.5	(41.5%)	
4.8 (23.4%)				

Band 16	18.9	8.7 (46.0%)
4.9 (25.9%)		
Band 18	39.7	14.8 (37.2%)
8.3 (20.9%)		
Band 19	30.4	11.0 (36.2%)
6.1 (20.1%)		
Band 20	22.5	5.6 (24.9%)
3.1 (13.8%)		

the increases resulting from the additional craft in the Bayport Marina are substantial. Unfortunately, there is no 'acres per craft' standard against- which the impact can be measured.

28. The beaching figures noted above could be substantially reduced by the occurrence of one event. That is, the leasing of a beach area across the river from Stillwater, Minnesota. During the final two days of hearings, evidence was received which indicated that for a three th period, the Applicants had been negotiating with the City of Stillwater for the lease of approximately 3,000 feet of shoreline immediately south of the Stillwater-Houlton bridge on the Wisconsin side of the river. This area was, at one time, operated and city park by the City of Stillwater, but it has been closed for two years.

The Applicants propose that part of the beach be reserved for users

of the Bayport Marina, and part be available for members of the public, al-

though no specific percentages have been assigned. The lease agreement has

not yet been finalized, although one of the Applicants testified that the City

Park and Recreation Board 'seemed very anxious to allow us [Applicants] to use

-20) .
(Tr. 10

It should be noted that if this transaction were consummated, boaters

from the Bayport Marina would be able to reach this beach without going through

either of the Narrows areas where boating congestion is a safety concern.

29. Both the moving craft figures and the beaching figures are based upon

an unproven assumption that boats from the Bayport Marina would not, as a gen-

eral rule, go more than nine or ten miles to the south. If they were to go

further, the impacts described above would be lessened because the boats would

be dispersed over a greater area. The assumption is based upon the fact that

there are few attractions to the south of Band 12 except for the already popu-

lar Kinnickinnic State Park area, which is located in Band 5. This area is

approximately 12 miles from the Bayport Marina site. A study done in 1979 in

the Prescott/Hastings area on the Mississippi (Pub. Ex. 7), found that 81% of

the marina-based boats that used the St. Croix did not go farther than about

11 miles, and a majority did not go more than six miles. However, applying

these figures from Prescott to Bayport must be done with caution because of

the location of the Kinnickinnic State Park area vis-a-vis Prescott.

The assumption limiting Bayport-based boats to Bands 12-20 is, there-

fore, somewhat suspect, but the figures developed based upon that assumption

are used because they are the, best available. Reassurance about their use

arises from the fact that the major beaches (except for the Kinnickinnic) are

in Bands 12, 13 and 18-20. It should also be noted that the figures are based

upon certain other assumptions (none of which the Examiner significantly ques-

tions) which can be found on pages 1 and 2 of Appendix A to Pub. Ex. 12. How-

ever, it must be remembered that the figures above relate only to peak times

and places, not to any "average". The figures thus present a worst case anal-

ysis, but one which is valid nonetheless because of the criterion of "public

safety' which must be considered.

30. As early as 1970, it was recognized that over-use was a problem on the

river. In a 1971 study entitled "Scenic River Study of the Lower St. Croix

River", it is stated:

Recreation utilization of the St. Croix River Valley has been judged to be at or near its optimum level. If efforts are not made to curtail and control the expected increase of recreational use on this river, the quality of its significant natural environment will deteriorate. While [designation under the federal program] . . . will undoubtedly encourage increased recreational use, this use will be controlled or regulated by carefully guiding or limiting the extent of further development and by judicious enforcement of regulations to protect and restore the

natural environment.

Between 1970 and 1980, surveys show that river use has increased approximately

60%. Because of the variations in surveys, the average of the 1970, 1971 and

1972 was compared with the average of the 1979, 1980 and 1981 figures to reach

this 60% figure. (See Pub. Ex. 11, Table 2, p. 4; and PI" El. 12, app.. B, p.

4).

31. Between 1970 and 1981, there has been a 16.5% increase in a number of known marina slips (from 1372 to 1577). (Pub. Ex. 12, App. B, p. 4). There-
fomre, most of the increased use can be attributed to launch ramps (trailer-
in boats) and Mississippi River craft. Regulatory agencies have limited growth
of marina slips but have done little to limit access by other means.

32. It is the intent of the Applicants that the marina be a 'first class,
full service marina'. It can be fairly characterized as -a 'recreation area'
as well as a marina because, under either of the alternative proposals, items
such as a pool, restaurant, and perhaps even tennis courts are envisioned.

33. The developers are willing to make many changes in their plans in or-
der to get a permit (see, for example, resolution of various problems proposed
in Applicants' Reply Brief, pp. 11-12 and 17-21). However, under current
plans, there are certain deficiencies relating to the lay-out and location of
various parts of the facility.

34. The pool, cabanas, comfort stations and restaurant are all proposed
to be located less than 100 feet from the ordinary high-water mark.

35. Riprap is proposed to consist of concrete rubble. This is not of
natural earth color tones.

36. Permanent docks (for transient use) are proposed to be located below
the ordinary high-water mark in the water course outside of the harbor.

37. Applicants have stated, and the Examiner accepts, their willingness
to do such grading, planting or other measures as the Department deems neces-
sary to render the facility, and all of its component parts, 'visually incon-
spicuous in summer months as viewed from the river'. Of particular concern are
any structures located on top of the most water-ward pier (including parked
cars). Screening can be accomplished by planting of mature vegetation or con-
struction of berms and planting of ground cover vegetation.

38. Transient docks are proposed for the water-ward side of the most wat-
er--ward pier. There is no method for screening these docks. The docks would
not be visually inconspicuous.

39. Under the marina-only proposal, the boat storage ("high and dry")
building would be so large that it could not be properly screened.

40. Applicants proposed a sign to advertise the restaurant. Such a sign,

if it is to serve any purpose, would not be visually inconspicuous.

41. One of the unusual features of the site in its present form is the existence of a natural bay on the north end of the site. This is the outlet for Perro's Creek. It has been proposed that this bay could be used as a site for the transient docks rather than the Applicants' favored location, which is on the water-ward side of Pier 3. This proposed alternative would require dredging. The docks, and boats moored at them, would not be visually inconspicuous, but their conspicuousness would be greatly reduced compared with the preferred location.

The transient docks could also be relocated to the landward side of Pier 3 or elsewhere within the harbor. This would result in the elimination of some of the permanent docks, but render the transient docks and associated boats visually inconspicuous.

42. Under the 'condominium and marina alternative, the density limitations of the Department's rule are complex and subject to varying interpretation.

initially, the Department calculated that the block of land at the north end of the site (excluding any land on the west side of the railroad tracks) constituted 532,830 square feet. At 20,000 square feet per lot, it would be suitable for 26 lots. A planned cluster development allows the number of lots to be increased by 50% resulting in 39 lots. If the mathematics is carried out to decimal places, that area would allow for planned cluster development of 40 units. These could be in the form of townhouses, low-rise condominium units, rowhouses, duplexes, or other structural designs. These figures do not include the area of the "piers" or the area of the small peninsula proposed for the pool because neither of these are suitable for buildings. The bays could be used for limited dockage such as one slip per residence. Facilities compatible with the residential development could be placed on top of the piers, such as tennis courts, a swimming pool, etc. so long as they could be properly screened.

In this initial computation, it was believed that there was no necessity to deduct from the buildable land any area for streets.

These statements were presented by Stephen Preston on June 28, 1979 at Tr. IV, pp. 96-115. Prior to this time, Applicants had not proposed the condominium with marina concept. Following this testimony, and during a lengthy recess which followed it, Applicants prepared the condominium with marina concept.

43. On January 18, 1982, the hearing reconvened following a recess. On the next day, January 19, Pat Olson, a successor to Mr. Preston testified that the area to be used in computations was only 231,250 square feet. Dividing that figure by 20,000 square feet per lot yields 11.56 units. When 50% is added for a cluster development, that yields a total of 17 units.

Approximately six to seven months prior to the reconvened hearing, a policy directive was issued by the Department stating that computations were to include street areas which, in this case, would reduce the number of lots to eight, which, when multiplied by 50%, would yield 12. However, if the restaurant, pool and cabanas were eliminated, then 31 units could be built.

The difference between Mr. Preston's 39 units and Ms. Olson's 31 units arises from the use of different maps, the policy change regarding streets, and different estimates of the amount of land to be excluded due to setbacks from the NOHW. Neither included any area to the west of the railroad tracks. That area is not buildable because of either steep slopes or wetland, and this is found to be properly excluded.

Counsel for the Department stated that both the Department and the developers were dealing with the condominium proposal on a fairly conceptual level and that numerous details would have to be worked out "and certainly one of them is just exactly what the measurements are."

44. A final proposal was raised by the Department on the last day of hearings. That proposal is that if there is to be a marina built on the site, it should be of more limited size than proposed by the Applicants. It should not include the high-and-dry building. Transient docks should be moved inside the harbor, and 12 other slips should be removed for safety purposes. These changes would leave 199 slips. Of those 199, 92 should be reserved for sailboats because sailboats have less impact upon river usage than do motor boats (they rarely beach, and their use would be mostly in the 'lake-type' areas where

crowding is of little concern. See, generally, facts in letter dated August 26, 1981 to Rod Lawson from Steve Johnson, pp. 4-6, which can be found in back of FEIS). However, the Department's basic position is that no marina should be developed on the site.

45. Public testimony is primarily divided between Wisconsin persons and entities opposing the site, and Minnesota persons and entities favoring the development of some sort of marina at the site. The Bayport City Council has approved the project. The City of Stillwater supports it. The Townships of Baytown and West Lakeland are concerned about traffic, but stated their positions before seeing the final EIS. The operators of four of the largest marinas on the river all testified in support of the project and the demand for it. Very little has been said about demand because no party seriously questions the fact that there is a demand for any type of boat slip, and particularly for slips capable of accommodating larger boats.

St. Croix County and the Cities of Hudson and North Hudson opposed the project.

The Minnesota-Wisconsin Boundary Area Commission stands out as having given very thorough review to the project. The commission finds the 437-boat facility to be "completely unacceptable". The Commission, however, "would have no objection" to a 244-slip marina so long as the beach across the river from Stillwater could be leased and managed as proposed by the Applicants. Without that beach, the Commission finds the impacts on the river to be too substantial to support the 244-boat alternative. The Commission is opposed to the location of the transient docks outside the harbor, but finds the north bay proposal "an acceptable alternative".

The State of Wisconsin opposes the development of any type of marina on the site. The National Park Service opposed the original 437-boat facility (Tr. VI!, pp. 68-80). Its position on the smaller alternatives is unknown.

46. All proposal which was raised at the hearing by a witness sponsored by the Applicants, but which received very little attention thereafter, is that of managing marina users so that they did not contribute to peak usage. In

other words, the marina would be built, but its users would be required to stay off the river during certain peak periods and to avoid certain peak usage areas. The problems with crowding are clearly problems of peak times and peak locations. While this "load management" theory has conceptual attraction, there are too many unanswered questions regarding practicalities of enforcement to give it serious consideration at this time (Tr. III, pp. 50-59, and 65-71; see, also, Memorandum).

47. The site, in its present condition, is not attractive and creates a distraction for river users. The City of Bayport has discussed its unattractiveness from time to time, but no action has been taken. (Tr. VII, p. 108, and X, p. 79).

48. The area around the site is not undeveloped. visual distractions are caused by the Allen King Generating Plant, coal piles, and a tall smokestack; the Andersen Corporation, the highway and railroad tracks.

49. The Examiner viewed the site on June 5, 1981, in the company of representatives of the parties and other interested persons. the dredging constitutes an obvious artificial manipulation of the landscape, and the size of the dredged area is larger than might be otherwise understood from the various

documents. Some perspective on the size can be gleaned from the aerial photo-

graph identified as Figure 2 in the final Environmental Impact Statement, Ap-

plicants' Exhibit R.

Based upon the foregoing Findings, the Examiner makes the following:

C O N C L U S I O N S

1. Any of the foregoing Findings which should more properly be deemed

Conclusions, or any of the following Conclusions which should more properly be

deemed Findings, are hereby adopted as such.

2. The Department gave proper notice of hearing in this matter; the De-

partment fulfilled all relevant, substantive and procedural requirements of

law or rule; and the Department and the Hearing Examiner have jurisdiction in

this matter in all respects.

3. The Lower St. Croix is a source of recreational, scenic and aesthetic

natural resources as those terms are used in Minn. Stat. Chapter 116D.04, subd.

6 (1980). The requested permit is a permit for natural resources management.

Id.

4. The 437-boat alternative would not protect and enhance the values which

caused the lower St. Croix to be included in the National Wild and Scenic Riv-

ers System. Its approval would be contrary to the comprehensive master plan

provided for in Minn. Stat. sec. 104.25, subd. 2 (1980). Its approval is not

reasonable, nor would it adequately protect public safety or promote the public

welfare, as set forth in Minn. Stat. S 105.45 (1980). Its approval is not in the public interest as that term is used in Minn. Rule NR 2201(f)(2)(aa). its

approval would cause impairment of the natural resources of the state under

Minn. Stat. sec. 116D.04, subd. 6 (1980). There are a number of feasible and pru-

dent alternatives. The boat storage facility ("high-end-dry building") cannot

be made visually inconspicuous as that term is used in Minn. Rule NR

2201(f)(2)(bb).

5. The 244-boat alternative would not protect and enhance the values which

cause the lower St. Croix to be included in the National Wild and Scenic Rivers

System. Its approval would be contrary to the comprehensive master plan pro-

vided for in Minn. Stat. 104.25, subd. 2 (1980). Its approval is not reason-

able, nor would it adequately protect public safety or promote the public wel-

fare, as set forth in Minn. Stat. sec. 105.45 (1980). Its approval is not in the

public interest as that term is used in Minn. Rule NR 2201(f)(2)(aa). Its ap-

proval would cause impairment of the natural resources of the state under Minn.

Stat. sec. 116D.04, subd. 6 (1980). There are a number of feasible and prudent

alternatives. This Conclusion is unaltered by the potential for the beach

lease which might be entered into with the City of Stillwater.

6. The Department is not equitably estopped from denying a permit for the

244-boat and 41-condominium alternative.

7. None of the aforementioned statutes, rules or plans would be violated

by a permit which limited the size of the marina to approximately the following

numbers:

- (a) Not more than one motorboat slip per housing unit;
- (b) Not more than 60 sailboat slips;
- (c) Not more than 50 slips for transient use, provided that such slips are located within the harbor;

- (d) Continuing jurisdiction by the Commissioner over screening so that, in his judgment, all facilities associated with the project are visually inconspicuous in summer months as viewed from the river;
- (e) Compliance with all other applicable statutes and rules.

This would constitute a feasible and prudent alternative as that term is used in Minn. Stat. S 116D.04, subd. 6. (1980)

Based upon the foregoing Conclusions, the Hearing Examiner makez the following:

R E C O M M E N D A T I O N S

1. That the Commissioner deny Applicants' request for a permit for either a 437-boat marina or a 244-boat marina and housing project.
2. That the Commissioner discuss with the developers the precise terms and conditions of a permit which would comport with the rules and would allow not more than one motorboat slip per housing unit, not more than 60 sailboat slips, and not more than 50 slips for transient use. Transient slips must be located inside the harbor . The Commissioner should retain jurisdiction, and final approval or disapproval authority over the success of the measures selected to visually screen all portions of the project from the river during the summer months.

Dated this day of August, 1982.

KLEIN
Hearing Examiner

N O T I C E

Pursuant to Minn. Stat. sec. 15.0422, subd. 1 (1980), the agency is required

to serve its final decision upon each party and the hearing examiner by first

class mail.

M E M O R A N D U M

This case is best summarized by the succinct statement of counsel for the

Department in his Reply Brief: 'Great project, wrong river!'

The Examiner firmly believes that Applicants desire to enhance the boating experience on the river. He also believes that they will carry through with their promises to meet certain requirements placed upon them. Their concept of a first-class, full-service marina and recreational area would be a desirable addition to almost any river.

The St. Croix, however, cannot be viewed as 'any river'. The river has a unique legal status. It is to be preserved for present and future generations of people so that the experience of it will remain as it was when it was singled out for designation. The numerous studies in the record which have been conducted since the river was designated demonstrate continued increases in use and a concomitant diversion from the concept of preservation.

The Examiner agrees with counsel for the two states that if the extensive

dredging had not already created a visual gap on the river's landscape, both

alternatives proposed by the Applicants should be denied. However, that visual

gap was created long ago with appropriate legal authorization. There is a con-

tinuing demand for boat slips on the river (an inexhaustible demand when compared with any reasonable estimates of new slips). Any meaningful attempt to

meet that demand will violate the federal and state laws setting aside this

river. The Examiner believes that his recommendation goes as far as is legally

possible to satisfy that demand and the legitimate complaint that marina-based

craft are being discriminated against in comparison with trailered-in craft,

and craft accessing the river from other points. Applicants are proposing to

work on a river which enjoys a special legal status which limits their activities.

They can either choose to accept those limitations or else abandon the

project.

The testimony of strategic planner John I. Eastling (Tr. III, pp. 50-59

and 65-71) contains one of the most interesting concepts for future management

of the river. That is, that its usage be broadened by limiting peak usage

and encouraging off-peak usage. However, that requires an extensive "permit

system' which is difficult to enforce. As Eastling stated:

KR. EASTLING: . . . it seems to me that it would be worthwhile to say at one point all usage of this river is going to be somehow limited. Not do so flies in the face of the statistics in

the study Nobody has a usage factor that's been declining over the last eight years, and that implies at some point you will be able to walk from Minnesota to Wisconsin on boats. Before that point is reached, I" guess, before we call the lower St. Croix la] ghetto, we ought to have a limit on all users. That limit then ought to be fairly imposed. How you impose a fair limit is a non-trivial problem, but I defer to the agencies. Lucky I'm only an expert on strategy.

MR. CLAPP: You don't have to implement the strategy?

MR. EASTLING: Right.

(Tr. III, pp. 68-69).

in order to postpone having to impose these kinds of regulations, every propo-

sal for a new ramp access, marina, or similar facility must be carefully re-

viewed . The two State Agencies and the Boundary Area Commission are to be com-

mended for performing this often unpopular and unpleasant job.

Continuing jurisdiction over screening is recommended because screening is

a vital part of the regulatory scheme in this segment of the river. While the

Examiner does not doubt the sincerity and ability of the Applicants' designer,

it is central to the Examiner's recommendation that today's promises actually

do become tomorrow's realities.

An analogous situation arose over the permitting of trap and skeet-shooting

facility near Hugo, Minnesota. In that case, prior to construction, neighbors

sought an injunction to restrain the project based upon fears of excessive

noise and blood-poisoning of waterfowl. The District Court denied the injunc-

tion, but noted:

The defendant is fully aware (and it is a matter of record) that it must bear the risk of being limited or totally enjoined in its use of this land as a gun club.

Construction then proceeded. once the facility became operational, the neighbors' fears because realities. They went back to court, and the court did enjoin the continued operation of the club. The trial court expressed its deep concern for the Clubs Substantial investment and the economic hardship that the injunction would cause. However, the court noted that the club had been put on notice and warned of the risks of going forward. The club appealed, and the Supreme Court affirmed. *MPIRG v. White Bear Rod and Gun Club*, 257 N.W.2d 762 (Minn. 1977).

The Examiner desires to put the Applicants here in the same 'on notice' status as the gun club. The screening must be effective. It must meet the standards as defined by the rules (not some lesser standard gleaned from dictionaries). The Examiner realizes that this places Applicants at a financial risk, but the nature of the work to be done is such that it can be accomplished, and must be accomplished if the marina is to be allowed to be built on this river.

The actual number of housing units is to be based on the rules. The Examiner did not attempt to set a fixed number because of the uncertainties over

Findings. this approach was recommended by both measurements noted in the counsel for the Department and counsel for the Applicants.

As a final matter, the Applicants' Brief contained new facts which were not in the record (a portion of the GREAT Study, Applicants' Brief, pp. lia-llc). Counsel for Wisconsin urged that this not be considered to avoid any potential claims of procedural irregularity. The Examiner agrees, and has not considered these materials. Counsel for Wisconsin also requested the same treatment of an affidavit from counsel for the Department appended to his initial Brief. The only facts from that affidavit which were used by the Examiner were already contained in the record (Pub. Ex. 12, at B. p. 4).

A.W.K.

